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NO. 972

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

ALBERT ROBERTS, JR.,
Petitioner,

versus

BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF BROWARD, STATE OF FLORIDA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF BROWARD, STATE OF FLORIDA,

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STATEMENT OF THE CASE

On May 2, 1939, the Board of Public Instruction for the County of Broward, State of Florida, approved a Refunding Plan for the voluntary exchange of certain outstanding bonds for new refunding bonds (R 11/19A). This Refunding Plan named Ralph A. Horton as Refunding Agent, and provided he should attempt to contact the holders of outstanding bonds and seek a voluntary exchange of bonds. For refunding fees and expenses of exchange, he was to receive a fee equal to 20% of the amount of coupons on

said bonds, or approximately $35,000. The Refunding Plan further provided, that the taxing division might use the same as a Plan of Composition in Bankruptcy proceedings, if it so desired (R 17A).

Later the taxing division decided to use the Plan, with proper amendments, as a Plan of Composition in bankruptcy, and on June 16, 1939, filed a petition in the United States District Court under the provisions of Chapter IX of the Bankruptcy Act (11 USCA 401-403) (R 1/11A). The Petition for Composition of Debts provided (R 5A, paragraph 11) that the Plan be modified to conform to the provisions of the Bankruptcy Act. Every step in the proceedings was taken by the taxing division and not by the Refunding Agent (R274/276 B), and all fees and expenses were approved by the bankruptcy court. (R 405/406 B). As a result the fees of the Refunding Agent were cut to $11,000 and allowed in that amount by the District Court (R 406 B).

The Plan of Composition, as amended, provided that the taxing division would exchange new bonds, bearing interest at 3% for 15 years and 4% for 15 years for the outstanding bonds, with all coupons attached. Fifty-seven claims were filed in the bankruptcy proceedings, and only two claimants objected to the Plan of Composition. Ed. C. Wright & Company, a corporation, filed claim No. 52 (R 58/59B) and Albert Roberts, Jr., Petitioner here, and Vice-President of Ed. C. Wright & Company, filed claim No. 54, involving $12,510.00 face amount of coupons clipped from the bonds filed under the corporation's claim No. 52.

The Board of Public Instruction objected to claims Numbered 52 and 54, filed by the corporation and its Vice-President, upon the grounds that both claims involved bonds and coupons which

could not be refunded under the Plan of Composition (R 58/60 A) and further objected to the allowance of claim No. 54, in the name of Albert Roberts, Jr., inasmuch as such coupons actually belonged to the corporation, Ed. C. Wright & Company, and not to the Vice-President, Albert Roberts, Jr., and the taxing division submitted positive proof to this effect, and proved to the satisfaction of the Special Master (R 235/241 B) and the Court (R 306 B and R 394 B) that the Vice-President had split the claims in order to create an artificial and technical issue.

In the face of the objection by the taxing division as to the split claims, Ed. C. Wright & Company took no further steps, never appeared by counsel to object at any stage of the proceedings, and eventually exchanged some valid, allowed and exchangeable bonds described under its claim No. 52. The objecting creditor, Albert Roberts, Jr., the Vice-President of the corporation, has appeared by counsel to object to every step in the proceedings. He first took an appeal to the Circuit Court of Appeals on the question of the constitutionality of the Bankruptcy Act as applied to a Board of Public Instruction, and the Act was held applicable to such taxing division in the case of Albert Roberts, Jr. vs. Board of Public Instruction for Broward County, Florida, 112 Fed. (2nd) 459. After objecting at every stage of the proceedings, he again appealed to the Circuit Court of Appeals from the Interlocutory decree in the case of Roberts vs. Board of Public Instruction for Broward County, Florida 117 Fed. (2nd) 943. He now files Petition in this Court, seeking a Writ of Certiorari.

The pretended claim of Albert Roberts, Jr., Petitioner here, involves coupons of the face amount of $12,510.00 which were

supposed to have been clipped from bonds filed under the corporation claim. Of such coupons, the amount of $5,070.00 could not be refunded, on account of res adjudicata doctrine, (R 264/272 B) having been involved in the case of N. A. Turner as Trustee vs. Board of Public Instruction for Broward County, Florida 75 Fed. (2nd) 147. The remaining coupons in the amount of $7,440.00 were allowed as a valid indebtedness affected by the Plan of Composition, but the Master found (R 241 B) and the District Court found (R 306 B) that such coupons belonged to the corporation Ed. C. Wright & Company, and not to the Vice-President, Albert Roberts, Jr. These findings were based upon sworn testimony and documentary evidence produced before the Master at the first hearing. The attorney of record for Albert Roberts, Jr. was present at such hearing, (R 235 B) heard evidence being introduced challenging the validity of the claim, and cross-questioned the witnesses. At the request of the claimant, Albert Roberts, Jr. (R 175 B), the hearing was adjourned for one week to permit the claimant to present evidence and substantiate his claim. At the adjourned hearing, the claimant, Albert Roberts, Jr., was not present, although his counsel was present (R 175 B). No effort was made to prove the validity of his claim or rebut the evidence offered to the effect that the coupons involved in his claim belonged to the corporation, Ed. C. Wright & Company (R 121 B, 151 B, 156 B, 276 B, 277 B). His objections to the allowance of the claim in the name of the corporation (R 303 B) were urged before the District Court and denied (R 306 B), and before the Circuit Court of Appeals and denied (R 426 B), and now petitioner renews the objection here.

NOTE: The complete record is comprised of two sections, Nos. 9381 and 9596. In referring herein to the records, the proceedings under No. 9381 will be designated "A" (thus 15-A) and those under No. 9596 as "B" (thus R 15-B). (All emphasis ours, except where otherwise designated.)

The Respondent does not believe that the Petitioner has brought his case within any of the grounds usually considered by the Supreme Court, under sub-section 5 of Rule 38, and that for such reason, the certiorari should be denied.

The claimant's first appeal (Roberts vs. Board of Public Instruction 112 Fed. (2nd) 459) involved a constitutional question, and from that decision an appeal could have been taken to this Court, but the claimant failed and refused to do so. The Petitioned is therefore concluded from raising here, by this proceeding, the question of the right or authority of the Respondent to proceed with the Plan of Composition in this proceeding.

ARGUMENT

POINT 1.

THE PROCEDURE FOLLOWED IN THE LOWER COURT AND SANCTIONED BY THE CIRCUIT COURT OF APPEALS WAS SUCH A DEPARTURE FROM THE USUAL AND ACCEPTED CUSTOM OF JUDICIAL PROCEDURE AS TO DENY THE PETITIONER HIS PROPERTY WITHOUT DUE PROCESS OF LAW.

The Petitioner's argument with reference to Point 1 (Page 15 of Petitioner's Brief) is predicated upon the theory that he comes into

Court with clean hands and a presumptively bona fide claim; and because the Master rejected the claim (R. 239-B) of the Petitioner, based upon objections of the taxing division and evidence produced at the hearing, he now insists that he has been deprived of his property without due process of law, contrary to the Fifth amendment to the Constitution of the United States.

The contentions of the Petitioner that he has been deprived of due process of law; that he comes into Court with clean hands; that the Plan of Composition discriminates against him, have been consistently ruled unfounded. The Master, appointed by the United States District Court for the Southern District of Florida after hearing uncontroverted evidence on the question of bona fides of the claim of Petitioner, held against the Petitioner (R 239-B to R. 242-B). The finding of the Master, as aforesaid, was confirmed by order of the Judge of the United States District Court for the Southern District of Florida (R. 306-B). The order of the United States District Court for the Southern District of Florida, approving the Plan of Composition of Debts and overruling the contentions of the Petitioner, as aforesaid, was appealed to the United States Circuit Court of Appeals for the Fifth Circuit, where the matter came on to be heard upon appeal before said Court, upon the contentions of the Petitioner that he should not be compelled to show the bona fides of the acquisition of his claim and the Circuit Court of Appeals for the Fifth Circuit, in ruling upon the contentions of the Petitioner, stated (R. 427-B):

> "We cannot at all agree with appellant. We think it quite plain that this record admits of no other conclusion than that appellant's position of ownership of the coupons,

whether real or colorable, and for the purpose of this proceeding it is unnecessary to determine which it is, was created in the interest of Wright & Company after the filing of the plan and exists for only one purpose, as a device to raise an apparent equity in his favor in contemplation of which the whole plan would be held invalid as discriminatory and unfair. We think this is true because appearing as he does, in an anomalous position, at first and until the plan was filed, in opposition to it as an officer of Wright & Company, the owner of both bonds and coupons, and after the plan is filed, in his own behalf as owner of coupons clipped from those very bonds, he has the burden of explaining the inconsistencies, and of establishing the integrity and consequent equities of his position.

"This burden appellant has wholly failed to sustain. Indeed, by not appearing to give testimony he has refrained from attempting to sustain it. In addition, appellee has, by the proof it made, assumed and carried the burden of establishing that appellant's ownership, as found by the Master, is either colorable or if real, was acquired after the filing of the plan; and that his predicament is the result of his own contriving under circumstances depriving it of equitable appeal, and making it quite clear that the principles and cases appellant relies on are without application here."

Albert Roberts, Jr., *versus* Board of Public Instruction for the County of Broward, State of Florida, 117 Federal (2nd) 943.

The real owner of the coupons involved in the claim is Ed. C. Wright & Company, a corporation of Florida, instead of Albert Roberts, Jr., who is the Vice-President of the corporation. During all the time when the Board of Public Instruction was attempting to work out a Plan of Composition with Ed. C. Wright & Company, and the Vice-President, Albert Roberts, Jr., no mention was made of the coupons which the Petitioner, Albert Roberts, Jr., was supposed to own, but on each occasion, the discussion centered around the matter of the fifteen bonds which could not be refunded (R. 150-B) on account of the decision in the Turner case.

Ed. C. Wright & Company, a corporation of Florida, is a bond concern, dealing in municipal bonds in the State of Florida. In some way it had purchased thirteen of the fifteen bonds of the issue of October 1, 1927, which had been in litigation in the case of N. A. Turner, as Trustee, vs. Board of Public Instruction for the County of Broward, State of Florida, tried in the District Court of the United States, for the Southern District of Florida, and verdict and judgment affirmed in 75 Fed. (2nd) 147 (R. 260-B).

After discovering that the corporation had purchased bonds which were involved in this litigation, Ed. C. Wright & Company, through Albert Roberts, Jr., its Vice-President, opened up negotiations relative to refunding this indebtedness. When the Petitioner was advised that it was impossible to refund these bonds, he then resorted to the strategy of creating an artificial issue as to ownership of coupons, in order to defeat the Plan of Refunding.

Thus it can be seen that, under the circumstances, Petitioner's insistence that he is the owner of said coupons and that he is discriminated against by the Plan of Composition of Debts, does not

stand the test universally recognized in the Courts of the United States that one claiming equity must come into Court with clean hands.

The Respondent respectfully insists that the contention of the Petitioner that the Plan of Composition of Debts denies the Petitioner his property, without due process of law, depends upon the showing of whether or not the Petitioner is the owner of the coupons involved in the claim. In this regard it is pertinent to ask, if Ed. C. Wright & Company, a corporation, owns the coupons, and not the Petitioner, Albert Roberts, Jr., wherein is the Plan unfair? The Plan provides that each bond owner shall surrender his bonds and coupons and receive new refunding bonds in exchange. All creditors are treated alike. The only creditors who testified upon hearing said that the Plan is fair and to the best interests of the creditors. (R 167/169 B). The Petitioner, Albert Roberts, Jr., offered no testimony upon hearing to support his contentions that the Plan is unfair. Therefore, how can it be said that the Plan is unfair to Petitioner when he has not proved the ownership of any securities affected by the Plan, has introduced no evidence as to the unfairness of the Plan, and when the Plan has been approved by the Master and affirmed by the Court.

The Respondent respectfully contends that the Petitioner has been given every opportunity to present any bona fide claim that he might have; that the objection raised in this litigation by the Petitioner is an effort on his part to create an artificial issue to impede the consummation of the Plan of Composition of Debts evolved by the Respondent; that said efforts on the part of the Petitioner are motivated entirely by a desire to compel recognition

by the Respondent of the fifteen void bonds involved in the Turner case.

Under the circumstances it seems to the Respondent that the Master was justified in requiring a showing of bona fides on the part of the Petitioner as to the acquisition of his alleged claim. This contention of the Respondent is supported by the finding of the United States Circuit Court of Appeals for the Fifth Circuit (R. 426-B):

> "The findings show that appellant was the vice-president of Wright & Company; that Wright & Company owned a large block of bonds and particularly several which have been adjudged invalid, and before and since the plan of composition was formulated it has opposed the efforts of appellee to refund its bonded debt unless these bonds are recognized; that the coupons appellant claims and filed claim as owner of were clipped from Wright & Company bonds; that it was appellant, who as vice-president of Wright & Company, conducted the conferences on its behalf with Appellee and as late as May and June, 1939, with the refunding agent of appellee, and refused on its behalf to join the refunding plan; and that at that time he made no claim on his own account, and none that the plan would discriminate against the holders of coupons only. These findings and the record show; that of all the holders of appellee's bonds only Wright & Company filed opposition to the plan; that no person before the filing of the plan, and only appellant since its filing has claimed to own coupons only; and that throughout all of the proceedings appellant

has consistently followed the practice of joining Wright & Company in objecting to and opposing the proceedings below and of appealing by himself from rulings adverse to these objections.

> Albert Roberts, Jr., v. Board of Public Instruction for the County of Broward, State of Florida, 117 Fed. (2nd) 943.

Respondent fails to find anything unusual about the procedure followed by the Special Master in determining the validity of the claims filed, or how the Special Master could have determined otherwise upon the evidence submitted. The Petitioner was represented at both hearings before the Special Master, and never appeared to offer any testimony to support the bona fides of his claim, nor did he object to evidence seeking to disprove same. (R. 121-B).

POINT 2.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, AS ANNOUNCED IN AMERICAN UNITED LIFE INSURANCE COMPANY VERSUS AVON PARK, 85 LAW EDITION 112; CASE VERSUS LOS ANGELES LUMBER CO., 308 U. S. 106.

The Petitioner has cited to this Court the case of American United Life Insurance Company v. Avon Park, 85 Law Edition 112, as apparent authority to justify his contention that the Plan of Composition of Debts is unfair. The Plan of Composition, as amended, did not warrant the criticism directed at the Plan involved

in the case of American United Life Insurance Co. vs. Avon Park, 85 L. Ed. 112 or in Case vs. Los Angeles Lumber Co., 308 U. S. 106. The Petitioner herein does not occupy the position of a bona fide creditor seeking to upset a Plan injurious to him as such bona fide creditor. Indeed, the bona fides of the claim of this Petitioning creditor have been consistently challenged and consistently ruled against, so that he does not even occupy the position of a creditor under the provision of the Bankruptcy Act.

The Petitioner's insistence that the Avon Park case (supra) is authority for his challenging the instant "fiscal agent" contract is not well founded. There is a vast difference in the "fiscal agent" contract of the City of Avon Park and R. E. Crummer & Company in that case, and the Plan of Composition of the Respondent in this case. Under the Crummer contract, the City was not obligated to pay any of the costs of the refunding, for such contract provided that Crummer should defray costs incident to assembling the bonds, print the refunding bonds, obtain a legal opinion approving the bonds, etc. In addition, R. E. Crummer and Company *was a bond owner* owning certain bonds to be affected by the Plan of Composition, and thus obtained an undisclosed profit on those bonds, without making a full disclosure of all compensation accruing to it under the Plan. The Supreme Court of the United States, in passing upon such contract, held:

> "4. In proceeding for confirmation of plan for composition of debts of city, where, without vote of city's fiscal agent, which was also a creditor, acceptance by requisite two-thirds of creditors would not have been obtained, the fiscal agent was under obligation of making full and com-

plete disclosure of all its interests, and the burden was on the fiscal agent of showing at least that such disclosure had been made. Bankr. Act Par. 81 et seq. as amended, 11 U. S. C. A. Par. 401 et seq."

"13. Where city seeking confirmation of plan for composition of city's debts was represented by fiscal agent which had acquired bonds at default prices, allowance of compensation to the fiscal agent without scrutiny of the agent's speculation in securities of the city was improper. Bankr. Act. Par 81 et seq., as amended, 11 U. S. C. A. Par. 401 et seq."

"15. The provision in statute, regarding composition of indebtedness of local taxing agencies, authorizing allowance of reasonable compensation for 'services rendered' necessarily implies loyal and disinterest service in the interest of the persons for whom claimant purported to act. Bankr. Act. Sec. 83, sub. b, 11 U. S. C. A., Par. 403, sub. b."

American United Mutual Life Insurance Company v. City of Avon Park, Fla. 61 Sup. Crt. Rep. 157, 85 L. Ed. 112.

The Supreme Court of the United States held that such contract must be set aside because the fiscal agent had not disclosed to the bondowners and to the Court its full compensation in the cause. *No such showing is made in the instant case.* No charge is made that the Refunding Agent failed to disclose all compensation accruing to him. There is no evidence that the Refunding Agent owns any bonds whereby he could have made a speculative profit as a result of the Plan of Composition, and his total compensation

was disclosed and approved by the District Court. All fees and expenses were reported and approved by the District Court as reasonable; the Refunding Agent was not acting in a dual capacity, and did not obtain an undisclosed benefit from the Plan.

Respondent does not insist that this plan is fair because 74% of the creditors have agreed to same; but Respondent does insist that the fact that 74% of the creditors had agreed to the plan at the time of entry of the Order of Confirmation, and that since such time additional creditors have agreed to the plan and exchanged their bonds, bringing the total exchanged to 87%, coupled with the fact that every creditor, who testified at the hearing, testified as to the fairness of the plan, left no alternative for the Master and the Lower Court, but to find the plan fair.

POINT 3.

THE LOWER COURT AND THE CIRCUIT COURT OF APPEALS FAILED TO FOLLOW THE DECISIONS OF THE SUPREME COURT OF THE STATE OF FLORIDA IN DETERMINING THAT THE BOARD OF PUBLIC INSTRUCTION WAS "AUTHORIZED BY LAW," AS REQUIRED BY THE ACT (11 U. S. C. A. 403 (e)) TO CARRY OUT THE PROVISIONS OF THE PLAN OF COMPOSITION.

The Petitioner's major premise, argued under Point 3, is that under the laws of the State of Florida, the Plan of Composition of Debts, evolved by the Respondent, is illegal.

As concerns the law of the State of Florida, it appears to the Respondent that there is no more convincing answer to Petitioner's contentions in this regard than to cite to this Court the Florida Supreme Court decisions, specifically approving the

particular Refunding Bonds issued pursuant to said plan, to-wit:

Bryan v. Board of Public Instruction for Broward County, 195 So. 697, 142 Fla. 691.
Bryan v. Board of Public Instruction for Broward County, 195 So. 698, 142 Fla. 693.
Bryan v. Board of Public Instruction for Broward County (1), 195 So. 699, 142 Fla. 695.
Bryan v. Board of Public Instruction for Broward County (2), 195 So. 699, 142 Fla. 696.

The Petitioner has cited the cases of Taylor v. Williams, 195 So. 175, 142 Fla. 402; Taylor v. Williams, 196 So. 215, 142 Fla. 756; W. J. Howey Co. v. Williams, 195 So. 181, 142 Fla. 415; Motes v. Putnam County, 196 So. 465, 143 Fla. 134; State v. City of Fort Myers, 198 So. 814, to support his contention that the Plan of Composition is illegal and void. Those cases present no similarity in factual background with the facts in the instant case. In each of those cases the fiscal agent, named therein, agreed to defray all expenses incident to assembling and exchanging the bonds, printing of the refunding bonds, representing the taxing divisions, validating said bonds, and obtaining the approving opinion of nationally recognized bond counsel upon the procedure used for the issuance and validation of said refunding bonds, said counsel to be selected by the said fiscal agent. In the instant case the Board of Public Instruction for the County of Broward, State of Florida, performed all of its duties in the validation and execution of the refunding bonds, retained Attorneys to file validation proceedings, retained Attorneys to write the approving opinion, and retained Attorneys to file the Bankruptcy proceedings.

The duties of the Refunding Agent in this case consisted in getting creditors to consent to the Plan of Composition of Debts, as modified by the Bankruptcy Act. In order to do so, it was necessary for him to employ assistants to help him in securing such consents. However, obtaining consents to the Plan of Composition of Debts is not an official act which necessarily must be performed by the Board of Public Instruction. The official acts, required to be performed by the Board of Public Instruction, are the adoption of a Plan of Composition, the employing of Attorneys to file and prosecute the bankruptcy proceedings, the authorization, validation and execution of the refunding bonds, and the payment of such expenses in connection with the Plan as are approved by the Bankruptcy Court.

It is, therefore, apparent that the instant "fiscal agency" contract does not run afoul of the ruling of the Florida Supreme Court in the Taylor v. Williams cases, because the plan does not contemplate nor provide that the Refunding Agent shall perform any other than ministerial duties.

As for the case of State v. City of Fort Myers, supra, Respondent respectfully quotes from the Court's findings, as follows:

> "In this case there has been no abdication of the power or authority of the City Commission; nor has there been any delegation of the power or discretion of the City Commission to the fiscal agents. That the administrative officers charged with duties of the sort involved here may pay reasonable fees for the services of fiscal agents to assist them in accomplishing the desired result has been

upheld by us in Pierce v. Isaac, 134 Fla. 666, 184 So. 509; City of Miami v. State, 139 Fla. 598, 190 So. 774."

"The record in the instant case shows that the operation of the refunding program, if and when the same is carried out according to its tenor and effect, will result in a saving to the City of something more than One-half Million dollars."

State v. City of Fort Myers, 198 So. 814.

The Petitioner continually refers to the Refunding Plan adopted May 2, 1939. That was a voluntary plan. When it was made a Plan of Composition in bankruptcy proceedings, it was amended to conform to the bankruptcy law, and provided that all procedural steps should be taken by the taxing division, and all fees and expenses approved by the Court. The creditors all consented to the Plan of Composition, as amended. The record (R. 6A, 18A, 37A, 45A, 106B, 114B, 116B, 273B, 117 B, 275B, 118B, to 121B, 276B, 125B, 131B, 135B, 136B, 138B to 140B) clearly shows that the procedure followed did not come within the criticism of the cases cited by Petitioner.

That the Refunding Plan adopted May 2, 1939 (R. 273 to 274B) was not the same as the Plan of Composition, as amended, and approved by the Court, clearly appears from the evidence, inasmuch as the Refunding Plan provided for an allowance of $35,362.92 as Refunding fees, while under the Plan of Composition, as amended, the fees allowed for the Refunding Agent, and approved by the Court, amounted to only $11,000 (R. 401B).

In a direct proceeding, the Supreme Court of Florida held

that, under this Plan of Composition, the particular fees to be allowed could legally be paid from the fund set up, as follows:

> "The pronouncement as to the validity is subject to the express provision that the payment of principal and interest of said bonds is limited to the definite portion of the special tax of not exceeding ten mills authorized to be levied under Section 8 of Article 12 of the Constitution of Florida, and the use of any other portion of the *general school fund* of Broward County for the purpose of payment of principal and interest on the refunding bonds, including refunding expenses, is not authorized, unless approved by a vote of the people * * * "
>
> Bryan v. Board of Public Instruction for Broward County, 142 Fla. 691, 195 So. 697.

The Supreme Court of Florida is thus saying that it approves the payment of principal, interest and refunding expenses on the new refunding bonds from the proceeds of the 10 mill tax levied against ad valorem valuations, both exempted and non-exempted, as provided in the Plan of Composition; but it does not approve the payment of such principal, interest and refunding expenses from funds in the General School Fund of Broward County, not realized as proceeds from such levy. The Plan of Composition does not contemplate using such State funds, forwarded by the State of Florida to Broward County, Board of Public Instruction for school operation funds, to pay principal, interest and refunding expense.

The contention of the Petitioner, therefore, that principal and interest of the refunding bonds, as well as refunding expenses, cannot be paid from the "B. P. I. Bond Fund" and the "B. P. I.

Homestead Levy Fund" is without merit, as our Supreme Court has ruled directly upon such point. The cases cited by the Petitioner are not in point, and therefore, can have no bearing upon this particular issue of bonds, inasmuch as the Supreme Court of Florida has ruled directly that these bonds are legally and lawfully issued, and are payable from the particular funds set out in the Plan of Composition.

The Barrett vs. Moffett case, 95 Fla. 111, 116 So. 71, quoted by the Petitioner in his brief, has heretofore been reversed by the Supreme Court of Florida, as well as by the Circuit Court of Appeals. This Barrett vs. Moffett case, supra, was argued by Appellant in each of the Bryan cases, supra, and the Supreme Court of Florida held that such case was overruled by the case of State vs. Board of Public Instruction of Dade County, 126 Fla. 142, 170 So. 602, and by State vs. Board of Public Instruction for Manatee County, 139 Fla. 519, 190 So. 686. The Circuit Court of Appeals overruled the Barrett vs. Moffett case in the case of Board of Public Instruction for Polk County, Fla. vs. Gillespie, 81 Fed. Rep. (2nd) 586.

In quoting from the case of Bryan vs. Board of Public Instruction for Broward County, Florida, 195 So. 697, Petitioner set out the portion of the decision which prohibited the use of certain funds for payment of principal and interest and refunding fees, but did not set out the portion of such decision, which authorized the use of the Special tax levied under the provisions of Section 8 of Article 12 of the Constitution for such purpose.

The Petitioner has contended that the "B. P. I. Homestead Levy Fund" is an illegal fund and not authorized in view of

Section 7 of Article Ten of the Constitution, known as the Homestead Amendment. There was a time when we Attorneys were mildly excited over the possibility of securing a holding that homestead property was exempt from bond indebtedness as well as operating expenses, but all of the Courts have now spoken on such subject and the matter is at rest. The cases are numerous, and no useful purpose can be served by citing them. The holding of the many decisions is to the effect that refunding bonds, issued to refund outstanding bonds, carry the same lien against homesteads as did the original bonds. The "B. P. I. Homestead Levy Fund" in Broward County, Florida, was created in accordance with the peremptory writ, issued by the District Court of the United States for the Southern District of Florida, in the case of United States of America, ex rel., George Kiess, Relator, vs. The Board of Public Instruction for the County of Broward, State of Florida, a body corporate, et al., Respondents.

If, as the Appellant argues, the procedure set out for payment of the refunding bonds and expenses of refunding is illegal, and can be enjoined, then the issuance of refunding bonds, as contemplated, would not have been authorized by the Lower Court and the Supreme Court of Florida, in the Bryan cases, supra.

The question of authority of the Board of Public Instruction of Broward County, Florida, to file proceedings in bankruptcy under the provisions of the Bankruptcy Act, was decided in the first appeal, Roberts vs. Board of Public Instruction, 112 Fed. (2nd) 459, wherein the Court held:

> "3. In determining the scope of the sections of the Municipal Bankruptcy Act and whether a particular peti-

tioner comes under them, the question whether the petitioner is a political subdivision of a state is unimportant, since without distinction on that ground all of the districts and municipalities named in the act as authorized to apply for composition are entitled to do so."

"4. Even if a political subdivision of a state could not invoke the Municipal Bankruptcy Act, a party objecting to a proceeding for composition of debts by a Florida county board of public instruction created and organized to instruct, maintain, and operate public schools or public school facilities could not avail of that position in view of Florida constitutional provision that the state shall be divided into political divisions to be called counties, since board, though it is an 'agency of the state,' is not a 'county'."

and no appeal having been taken from that decision, the decision of the Circuit Court of Appeals stands. The authority of a Board of Public instruction to avail itself of the provisions of the Bankruptcy Act had previously been upheld in the case of Getz vs. City of Edinburgh Consolidated Independent School District, 101 Fed. (2nd) 734.

POINT 4.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IN SUSTAINING THE OBJECTION BY THE BOARD TO PART OF PETITIONER'S CLAIM IS CONTRARY TO THE DECISION OF THE SUPREME COURT OF FLORIDA.

The doctrine of res adjudicata prevented the Special Master from allowing coupons totalling $5,070.00 from being proven as a debt of the taxing division. These coupons had been involved in an action for money had and received in the lower Court, and a ver-

dict for the defendant in such Court had been affirmed by the Circuit Court of Appeals in the case of N. A. Turner, as Trustee vs. Board of Public Instruction for the County of Broward, 75 Fed. (2nd) 147. At the Special Master's hearing, the taxing division objected to Petitioner's claim, and introduced in evidence certified copies of the verdict and judgment in the lower Court. (R. 84/87 B). The Petitioner objected because all of the file was not introduced in evidence. The Special Master felt that the verdict, final judgment, petition to remove exhibits, Order Allowing Withdrawal of Exhibits, receipt for exhibits, and mandate would be sufficient (R 86-B), but upon the insistance of the petitioner, permitted him to introduce in evidence such other parts of the record of such case as he desired, and Petitioner did introduce other parts of the record of such case (R 102 B).

The record (R 63 B & 267 B) shows conclusively that the coupons involved in Petitioner's claim were the same as the coupons introduced in evidence in the Turner case, and withdrawn from the file after the mandate from the Circuit Court of Appeals in that case had been filed. Petitioner here is an assignee of N. A. Turner, Trustee, and Petitioner's contention that he is not in privity with the Plaintiff in the Turner case is not well founded.

In addition, Bonds Nos. 66 to 78 inclusive, which were introduced in the Turner case, and to which Petitioner's coupons until recently were attached, were identified on the face thereof, as having been introduced in the Turner case, and withdrawn by permission of the Court, and the receipt of the attorney of record taken for same (R 269 B). Therefore, in addition to being constructively charged with notice of the Turner suit, the Petitioner was actually put on notice of the holding, verdict and judgment in that case.

The Respondent takes the position that it is powerless to refund the fifteen bonds which were involved in the N. A. Turner litigation. In that litigation, N. A. Turner, as Trustee, filed his civil action in the District Court of the United States for the Southern District of Florida, to recover a judgment for money had and received on fifteen bonds of the issue of October 1, 1927, described in Petitioner's Exhibit No. 2 (R. 260-B). This suit was filed shortly after the decision in Barrett v. Moffett, supra, under the theory that, if the bonds were not valid obligations, then the debt evidenced by the bonds was a valid obligation, and a judgment could be recovered on the debt. At the time of filing suit, the bonds had not matured, but certain of the coupons from said bonds set out in Petitioner's claim had matured. In disposing of the case, the Judge charged the jury that it should return a verdict for the Defendant (R. 280-B), and, after the verdict was returned for the Defendent (R. 265-B), the Judge entered a judgment for the Defendant (R. 265-B). The Plaintiff in said case took an appeal to the Circuit Court of Appeals, which resulted in the Circuit Court of Appeals approving the verdict of the jury and the judgment of the Court. (See Turner, as Trustee, Appellant, versus Board of Public Instruction for the County of Broward, State of Florida, Appellee, 75 Fed. (2nd) 147 (R. 270-B).)

The Board of Public Instruction construed such judgment and affirmance by the Circuit Court of Appeals to mean that, on a question of fact, the Jury had determined that the holder of such obligations should not recover against the Board of Public Instruction for Broward County, Florida. The State School Auditor so ruled, and the said bonds were removed from the records of obligations which the Board should pay (R. 101-B). As no further pro-

ceedings were taken in the case, the matter became res adjudicata. If the Board of Public Instruction had included these bonds as obligations to be refunded in the Plan of Composition of Debts, the plan would have been illegal. There was no alternative in the matter, and the Board necessarily had to exclude these obligations from the Plan of Composition.

The Petitioner is now arguing that the Turner case is not res adjudicata; that the action sought to recover on a debt and not upon the bonds; the Board has waived its plea of res adjudicata. We cannot follow the argument of the Petitioner. At its first opportunity, the Board interposed objections to the allowance of a claim including such obligations (R. 58-A to 60-A). The Special Master did not feel that he was authorized to go behind the judgment of the Appellate Court, and the Lower Court found that it could not go behind the judgment of that Court.

We regret that the creditor has purchased bonds involved in this litigation, but he is charged with knowledge of the records, and the records clearly show that a jury had made findings upon the subject matter, the Court had entered judgment, and same had been affirmed by Appellate Court. The Order allowing withdrawal of exhibits (R. 268-B), and the receipt for such bonds (R. 269-B) were public records at the time that Petitioner's corporation purchased the bonds, and Petitioner's corporation, as well as Petitioner, is charged with the notice of the record.

Petitioner is asking this Court to reverse the decision in the case of N. A. Turner v. the Board of Public Instruction for the County of Broward, 75 Fed. (2nd) 147. Respondent contends

that the matter is res adjudicata, and the Petitioner's request comes too late.

CONCLUSION

No suffcient showing has been made to entitle the Petitioner to a Writ of Certiorari. There is no showing that the Circuit Court of Apppeals of the Fifth Circuit has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter; or that it has decided an important question of local law in a way probably in conflict with applicable local decisions; or that it has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or that it has decided an important question of federal law which has not been, but should be, settled by this Court; or that it has decided a federal question in a way probably in conflict with applicable decisions of this Court; or that it has so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

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